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No. 99-806

In The

Supreme Court of the United States

LISA GRANBERRY, COSETTI JORDAN, ALICE GLASSPOOL, CHRISTOPHER GLASSPOOL, on behalf of themselves and all others similarly situated,

Petitioners,

v.

ISLAY INVESTMENTS, a California Partnership, MARVIN TREVILLIAN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ANSWERS TO QUESTIONS PRESENTED

1. In a class action by tenants against their former landlord for the return of a security deposit less offsets for unpaid rent, cleaning and repairs (Cal. Civ. Code sec. 1950.5), the trial court had jurisdiction over the entire cause where:

a. the entire cause (i.e., security less offsets) was certified as a class action and the trial court expressly found, *inter alia,* that the named plaintiffs could adequately represent the class as to all issues;

b. the original class notice advised absent class members that the resolution of "security less offsets" was at issue and that petitioners' counsel would represent them;

c. the California Supreme Court directed that the offsets be allowed under the equitable principle that either party to a transaction involving mutual debts and credits can strike a balance holding himself owing or entitled only to the net difference (Cal. Code of Civ. Proc. sec. 431.70;

d. the trial court utilized the device of split trials – an evidentiary hearing as to class-wide issues and an individualized claims process, with a second class notice advising absent class members of their right to make a claim and a provision for individual hearings in accordance with California Small Claims procedures; and

e. no offsets were adjudicated against any absent class member. The trial court considered offsets against non-claiming class members for the sole purpose

ANSWERS TO QUESTIONS PRESENTED – Continued

of calculating the amount made available for the class to determine attorneys' fees (Cal. Code of Civ. Proc. sec. 384).

2. An order for the reversion of unclaimed class funds to defendants is proper where, as here:

a. the California Legislature has preserved the trial court's equitable discretion with respect to the disposition of unclaimed class funds (Cal. Code of Civ. Proc. sec. 384);

b. the case arises out of respondents' good faith misinterpretation of a California statute which the California appellate court held "teeters on the brink of unintelligibility";

c. under California law, unclaimed security does not belong to the tenant; to the extent that the security exceeds the offsets, the sum is a debt owed by the landlord to the tenant;

d. the amount ordered to revert to respondents was theoretical, because respondents suffered a $1.4 million net loss on the program found to involve a security. That $1.4 million, plus all of the security, was spent for the benefit of the class, to remedy defaults in rent, and to pay for cleaning and repairs;

e. the second class notice specifically advised the absent class members that, if they did not make a claim, their right to a refund would be extinguished.

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THERE ARE NO GROUNDS FOR ISSUANCE OF A WRIT OF CERTIORARI

Petitioners invoke this Court's jurisdiction under 28 USC section 1257(a). They apparently claim a "title, right, privilege or immunity . . . specially set up or claimed under the Constitution." There are no grounds for issuance of a Writ of Certiorari for the following reasons:

A. There is No Party With Standing to Present the Writ. Federal standing "requires an allegation of a present or immediate injury in fact, where the party requesting standing has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.' " *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805, 86 L.Ed.2d 688, 641-642, 105 S.Ct. 2965 (1985). The named plaintiffs have no standing because the offsets against them exceeded the amount of their security. The class claimants are not before the Court; they have all been paid and none has appealed. The only party with arguable standing to challenge the adequacy of his or her representation in this action would be an absent class member who does not wish to be bound by the class action judgment. However, it is well settled that such a challenge is made in a subsequent attack on the judgment, and not in this proceeding. *Zablocki v. Redhail*, 434 U.S. 374, 378, fn. 6, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1244-1245 (9th Cir., 1997).

B. Petitioners Did Not Preserve Their Claims for this Court's Review in Any Event. As the California

Court of Appeal found (Pet. App. 44), petitioners conceded the trial court's jurisdiction to resolve the question of security less offsets on several occasions. Moreover, after remand from the California Supreme Court, petitioners conceded the trial court's discretion to order reversion. Therefore, the issues presented by petitioners were not timely raised and not preserved for this Court's review. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 2820, fn. 4, 65 L.Ed.2d 973 (1980); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 23 S.Ct. 375, 47 L.Ed. 480 (1903).

Furthermore, the due process required for jurisdiction over absent class members involves (a) the best practicable notice (which should describe the action and the plaintiffs' rights in it), (b) a provision for absent class members to opt out, and (c) the requisite finding that the named plaintiff adequately represents the interests of the class. *Phillips Petroleum Co. v. Shutts, supra*, 472 U.S. 797, 811-812. The requirements of *Phillips* were met in this case. Certification orders are appealable orders in California (*see, e.g., Block v. Major League Baseball*, 65 Cal.App.4th 538 (1998)); petitioners did not appeal. Therefore, petitioners' challenge to jurisdiction was not timely raised or preserved for this Court's review. *Loeb v. Trustees of Columbia Twp.*, 179 U.S. 472, 481, 45 L.Ed. 280, 21 S.Ct. 174 (1900); *Mutual Life Ins. Co. v. McGrew, supra*, 188 U.S. 291, 308.

Finally, the original class notice, mailed and published per *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L.Ed.2d 732, 746-747, 94 S.Ct. 2140 (1974), advised the absent class members that they would be represented by petitioners' counsel (App. 1, 6). The California Supreme

Court took heed of that notice and found, as a factual matter, that petitioners' contentions regarding "lack of notice [were] unavailing" (*Granberry v. Islay Investments*, 9 Cal.4th 738, 749 (Pet. App. 15) (1995)). Petitioners' counsel represented the absent class members throughout the proceeding and, at the conclusion of the case, took fees for that representation pursuant to the class notice.

For all these reasons, petitioners have not preserved their claims for this Court's review.

C. There is no Federal Question.[1] Throughout this case, the California Courts have construed California statutes in accordance with their California legislative history. This Court has long held that "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 94 S.Ct. 740, 744, 38 L.Ed.2d 702 (1974); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 1541, fn. 9, 56 L.Ed.2d 1 (1978).

1. California Civil Code section 1950.5 (Pet. App. 83-86). This statute governs the relationship between landlords and tenants in California with respect to security deposits. In pertinent part, the statute requires

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[1] The California Courts did not decide any of petitioners' alleged federal questions. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296, 2300-2301, fn. 3, 76 L.Ed.2d 497 (1983). Petitioners have not made the requisite showing.

a landlord to return the security deposit within a specified time after the termination of a tenancy, and to provide a written accounting of any portion retained as compensation for unpaid rent, repairs and cleaning (Civ. Code sec. 1950.5, subd. (f)). The California Supreme Court granted review in *Granberry v. Islay Investments, supra,* 9 Cal.4th 738 to determine "whether a landlord who in good faith fails to comply with the requirements of [section 1950.5] may nevertheless recover damages for unpaid rent, repairs, and cleaning in a subsequent judicial proceeding" (*Ibid.*, 9 Cal.4th at p. 741 (Pet. App. 2)).

The resolution of the issue turned on an analysis of the legislative history of section 1950.5 (*Ibid.*, 9 Cal.4th at pp. 744-749 (Pet. App. 7-16)). Federal courts defer to state courts' analysis of state legislative history. *Exxon Corp. v. Eagerton, supra,* 103 S.Ct. 2296, 2301, fn. 3. The resolution of the question also turned on the California Supreme Court's conclusion that a defensive setoff is not a separate claim, but is instead founded on the equitable principle that "either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference" (*Ibid.*, 9 Cal.4th at p. 744 (Pet. App. 6)).[2]

Within the statutory matrix of section 1950.5, the Legislature created a debtor-creditor relationship between landlord and tenant with respect to the security. *Korens v. R. W. Zuken,* 212 Cal.App.3d 1054 (1989). Therefore, the resolution of a defensive setoff between landlord

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[2] This Court has recognized similar principles. *See, e.g., Scammon v. Kimball,* 92 U.S. 362, 367, 23 L.Ed. 483, 485 (1875).

and tenant does not constitute a "taking" of the tenant's property.

2. California Code of Civil Procedure section 431.70 (App. 11). The California Supreme Court confirmed that this statute simply provides a *procedure* for the assertion of equitable offsets (*Ibid.*, 9 Cal.4th at p. 744 (Pet. App. 7)). "The Federal Constitution does not undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced . . . " *Honeyman v. Hanan*, 302 U.S. 375, 378, 58 S.Ct. 273, 82 L.Ed. 312 (1937). Moreover, and in any event, the assertion of a private offset, even if granted by the Legislature, does not constitute state action for the purpose of the Fourteenth Amendment to the United States Constitution. *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 357 (1974).[3]

3. California Code of Civil Procedure section 384 (Pet. App. 87-88). This statute provides guidance for the exercise of broad discretion by trial courts with respect to the disposition of unclaimed residue in class actions. *Granberry v. Islay Investments, supra*, 9 Cal.4th at pp. 750-751 (Pet. App. 18). The California Supreme Court rejected petitioners' claim that this statute, in conjunction with the California Unclaimed Property Law (Cal. Code of Civ. Proc. sec. 1500, et seq.), mandated escheat of unclaimed residue in all class actions.

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[3] *See, Bank of Marin v. England*, 385 U.S. 99, 101, 87 S.Ct. 274, 17 L.Ed.2d 197, 200 (1966), noting that the relationship between a debtor and creditor is founded upon contract and therefore not a state action.

The trial court, contrary to petitioners' drum beat throughout their petition, **did not "adjudicate"** any offsets against any absent class members; only those class members who made a claim had their offsets individually adjudicated pursuant to an administrative procedure painstakingly established after several hearings.

THERE WAS NO ERROR IN ANY EVENT

California courts follow federal precedent and procedure in class actions. *Green v. Obledo*, 29 Cal.3d 126, 146 (1981). In this case, the California courts followed the principle set forth by this Court in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980): a class action right is a "procedural right only, ancillary to the litigation of substantive claims." Therefore, when the California Supreme Court held that a good faith landlord did not forfeit offsets for failure to timely comply with the accounting requirements of Civil Code section 1950.5, the California Supreme Court preserved respondents' right to assert those offsets, even though the form of the action was a class action.[4] The following abbreviated explanation of this lengthy litigation conclusively demonstrates that there was no error.

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[4] "Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." *Granberry, supra*, 9 Cal.4th at p. 749 (Pet. App. 16).

The Nature of the Case, the Class Certification and the Original Class Notice

The rental agreements for this class did not provide for a security deposit. The disputed sums were received as rent under a rent discount program, in which tenants elected to pay their rent daily, weekly, bi-weekly, or monthly. Depending upon the option which the tenant chose, the rent for the second and subsequent months might be more or less than the first month (Exh. 279C (JAII 6412)).[5]

In 1981, petitioners' attorneys solicited the named plaintiffs as class representatives and alleged that, in those cases where the tenant's election resulted in a lesser rent for the second and subsequent months, the differential constituted a "security" within the meaning of California Civil Code section 1950.5 (Pet. App. 83-86). The statute, which the California Court of Appeal found "teeters on the brink of unintelligibility"[6] (*Granberry v. Islay Investments*, 161 Cal.App.3d 382, 388 (1984)), provided fertile ground for the litigation – now in its 19th year.

Petitioners' complaint acknowledged respondents' right to offset under Civil Code section 1950.5. In

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[5] Rent discount programs were not uncommon in California at the time. The California Legislative Counsel commented: "[I]nsofar as a landlord is not prohibited from imposing a de-escalating rent structure, we are of the opinion that a landlord may lawfully charge a greater amount for the first month's rent than for succeeding months" (JAI (AB 3721)).

[6] Section 1950.5 defines "security" as " . . . **any payment**, fee, deposit or charge, including, but not limited to, an advance payment of rent, **used or to be used for any purpose**, including, but not limited to, any of the following [rent, repair of damage, cleaning, etc.]." (Pet. App. 83.)

petitioners' motion for class certification, they stated: "[respondents] will have an obligation to refund such surcharges to each tenant less only those deductions, otherwise proper, which defendants now may take according to Civil Code section 1950.5(e)" (JAI 223). Over respondents' opposition,[7] the case was certified as a class action. The trial court found: (a) the "action involves a question of common or general interest," (b) "common and similar issues of fact and law predominate over issues which must be tried on an individual basis," (c) "[a]ll of the plaintiffs are members of the class and their claims are representative of the claims of the unnamed members of the class," (d) **"[t]he plaintiffs are able to fairly and adequately represent and protect the interests of all class members"** (JAI 1009-1011, emphasis added). **Petitioners have never challenged the certification order.**

In 1982, the trial court granted summary judgment for respondents, finding that the "first month's rental charged by Islay was 'rent' in fact as well as in name" (JAI 1026). However, in 1984, the California Court of Appeal reversed, holding that the question of whether funds constitute "security," as that term is defined by

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[7] Respondents opposed certification (JAI 907). After remand from *Granberry v. Islay Investments, supra*, 161 Cal.App.3d 384, respondents moved to decertify the class because separate hearings would be required for each class member (JAI 1170-1211, 1192-1197). Petitioners opposed, claiming that both security and offsets could be determined on a class-wide basis (JAI 1348-1356). Respondents' motion was denied and the class remained certified.

section 1950.5, involves a question of fact. *Granberry v. Islay Investments, supra,* 161 Cal.App.3d at p. 388.

On remand, the trial court granted respondents leave to amend their answer to allege offsets for unpaid rent, repair, and cleaning in the event a jury were to find that the disputed sum was a security. With the exception of named plaintiff Granberry, against whom judgment was entered on a cross-complaint, **the offsets remained in the case only as an affirmative defense.**

As the Court of Appeal found (Pet., App. 44), petitioners conceded the trial court's jurisdiction over the affirmative defense of offsets throughout the proceedings. In fact, in one of those concessions, petitioners suggested the very procedure which the trial court ultimately adopted to resolve the offsets:

> "Quashing service of the cross-complaints . . . will not divest the Court of jurisdiction to determine the viability of the affirmative defenses alleged in Islay's answer to the Second Amended Complaint. This Court can determine the viability of such setoff claims in the context of the class action, and, should the court find that some of those set-off claims can be asserted and are viable, devise an appropriate method to resolve the individual fact issues relevant to a determination of the amount, if any, owed by Islay to each individual absent class member." JAI 2397-2398.

In accordance with the complaint, the answer, the certification order, and petitioners' concessions, the original class notice (App. 1-10) advised the class that any refund they might be entitled to recover "must be

reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary wear and tear." The notice also advised the class that, if they did not request to be excluded, they would be represented by petitioners' counsel (App. 1, 5-6).

The original notice was **published** and **mailed** to each class member for whom petitioners had an address.[8] Petitioners **never** challenged the adequacy of the notice in the California courts.

There is no support, in law or logic, for petitioners' claim that "actual notice" to each member of this class was required. The "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950). In class actions, publication and mailing to all class members whose addresses can be ascertained is the "best notice practicable." *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156, 40 L.Ed.2d 732, 746-747, citing *Mullane*.[9]

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[8] The original notice was mailed to 5,438 class members whose addresses could be ascertained; 3,682 (or 68%) of the first notices were received (JAI 1892-1893).

[9] In *Mullane*, this Court specifically held that published notice was constitutionally sufficient for beneficiaries whose interests or whose whereabouts could not be ascertained. In *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 77 L.Ed.2d 180, 103 S.Ct. 2706 (1983) and *Tulsa Collection Services v. Pope*, 485

The order for certification, and the notice to the class, established the trial court's jurisdiction over absent class members. *Phillips Petroleum Co. v. Shutts, supra,* 472 U.S. 797, 811-812.[10]

In 1988 and 1989, at a cost in excess of $160,000, respondents itemized the damages for each tenancy in the class and provided the information to petitioners' counsel during discovery. The information was not provided to individual class members because respondents were restrained from any and all contact with class members about the subject matter of the litigation (JAII 4795-4797).

Shortly before trial in 1990, the trial court dismissed respondents' affirmative defense of offsets. That is the ruling which the California Supreme Court later reversed (*Granberry v. Islay Investments, supra,* 9 Cal.4th 738 (Pet. App. 1-38)).

When the case was tried in 1990, the jury was provided copies of portions of the statute but was **not** informed that the court had forfeited respondents' offsets

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U.S. 470, 490, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988), this Court held published notice insufficient only because the names and addresses of parties were known or reasonably capable of ascertainment.

[10] This case is readily distinguishable from *Ortiz v. Fibreboard Corp.*, ___ U.S. ___, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), which involved the conditions for certifying a mandatory settlement class on a limited fund theory. In *Ortiz*, the due process rights of the absent class members were implicated because the trial court did not protect the "potentially conflicting interests" of various categories of claimants to the limited fund (*Ibid.*, 119 S.Ct. at p. 2308).

(JAI 3955, 3981-3982, 3989). The class representatives testified: (a) they had no complaints about the rent discount program; (b) they were not misled; (c) they did not expect any accounting or refund when they vacated their apartments because they did not believe they had paid a security. Similarly, respondents testified that they treated the disputed sum as rent for all purposes. All rents were deposited into Islay's general account (subject to income and other taxes), from which respondents paid the costs of operation, including cleaning and damage repair. (JAII 5914.8-5914.9).

After a 23-day jury trial and 4 days of deliberation, the jury found (by vote of 9 to 3) that respondents had taken a "security" within the meaning of section 1950.5. The finding confirmed the problem with Civil Code section 1950.5 – a transaction can involve a "security" even though a landlord thinks he took only rent, and even though the tenants believe they paid only rent. In 2 hours, the jury found that respondents had not acted in bad faith.

Based on the jury's findings, the trial court ordered respondents to refund the jury-found security to each class member who made a claim (JAI 4296-4297). All parties appealed. So far as is pertinent here, the Court of Appeal (2d Civ. No. B057796; 23 Cal.Rptr.2d 420 (1993)) reversed the trial court's forfeiture of respondents' offsets. The California Supreme Court granted review.

The Opinion of the California Supreme Court – *Granberry v. Islay Investments*, 9 Cal.4th 738 (1995)

In *Granberry v. Islay Investments*, 9 Cal.4th 738 (Pet. App. 1-38) (1995), the California Supreme Court held that, under the statutory scheme enacted by the California Legislature in Civil Code section 1950.5, good faith landlords are entitled to claim equitable offsets against a security deposit – even within the procedural context of a class action (*Id.*, 9 Cal.4th at p. 743 (Pet. App. 2)). The California Supreme Court rejected petitioners' characterization of the offsets as distinct from the security and also rejected petitioners' claim that the resolution of offsets against absent class members would involve a "default" judgment. The Court held that Civil Code section 1950.5 gives the tenant the right only to the "remaining portion" of the security (i.e., the "net difference" after deduction of offsets). *Granberry, supra*, 9 Cal.4th at p. 744 (Pet. App. 6). The California Supreme Court directed the trial court to conduct an evidentiary hearing, at which respondents would be required to prove that they suffered damages for unpaid rent, cleaning and repairs and that the amount they claimed was reasonable (*Granberry, supra*, 9 Cal.4th at pp. 749-750 (Pet. App. 16)).

The California Supreme Court also rejected specific arguments by petitioners and by *amicus curiae* California Attorney General that, as a matter of law, the trial court was required to create a fund and was required to dispose of any residue by either fluid recovery or escheat. The Court construed both the California Unclaimed Property Law (Cal. Code of Civ. Proc. secs. 1500, et seq.) and California Code of Civil Procedure section 384, and confirmed that the California Legislature intended to, and

did, preserve the trial court's equitable discretion with respect to the disposition of unclaimed residue in class actions.[11]

The California Supreme Court rejected petitioners' characterization of section 384 as a **substantive** statute which divests the trial court of equitable discretion, and confirmed that section 384 is a **procedural** statute, which simply requires trial courts to make certain findings with respect to unpaid residuals in class actions (*Id.*, 9 Cal.4th at p. 751 (Pet. App. 19)). In light of the California Supreme Court's allowance of respondents' offsets, the trial court was directed to "reconsider" its choice of remedy after the evidentiary hearing (*Ibid.*, at p. 751 (Pet. App. 19)).

Formulation of Class-Wide and Individual Claims Procedures, and the Second Class Notice

On remand, following the directives of the California Supreme Court (*Granberry*, 9 Cal.4th 738, 750-752 (Pet. App. 19)), the trial court shaped a **two-part procedure**: (1) an evidentiary hearing to resolve the class-wide issues with respect to offsets and equitable defenses, and (2) an individualized claims process, to be conducted in accordance with California Small Claims procedures.

The trial court also formulated a second notice for the class (Pet. App. 79-82), to inform absent class members of the status of the litigation and the upcoming proceedings.

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[11] In California, escheat is the "last resort" in class actions. *State v. Levi Strauss and Company*, 41 Cal.3d 460, 475 (1986).

As the California Court of Appeal held, there was no abuse of discretion (Pet. App. 48-49).

The second notice advised the absent class members of the status of the litigation and reminded them that any refund they might be entitled to recover was subject to offsets. The notice stated the date of the evidentiary hearing, and also advised the class of the claims procedure which they were required to follow if they desired a refund. The claim form was attached to the notice, and the notice stated:

> "IF YOU FAIL TO MAKE A TIMELY CLAIM ACCORDING TO THE INSTRUCTIONS PROVIDED IN THIS NOTICE, YOU WILL HAVE NO FURTHER RIGHT OR CLAIM TO RECOVER FROM ANYONE IN THIS CLASS ACTION." Pet. App. 81.

Respondents paid to have petitioners' mailing list updated through a national service (JAII 5064-5066). Notices and claims forms were mailed to 5,386 class members (JAII 5067-5068, 5085-5086).[12] The notice was also published once-weekly for three consecutive weeks in newspapers in Santa Barbara and surrounding counties, where respondents' properties were located (JAII 5075-5087, JAII 5079-5081, JAII 5082-5083). The trial court increased the duration of publication and expanded the

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[12] The national service updated 5,386 of the original 5,438 addresses and the Mailing House mailed 5,386 notices. From that mailing, 3337 notices (62%) were returned (RT 514). Therefore, of the 2,049 class members who presumptively received the second notice, only 76 (3.7%) were sufficiently interested to file claims (Exhs. 296 and 297).

geographical coverage for the second notice to reach tenants who might have moved while the litigation was pending (JAI 1598-1600, 1892-1893).

The notice was not required to advise each individual class member of the specific amount of the offsets claimed against him or her, just as it was not required to advise each class member of the specific amount of his or her security.[13] A class action notice need only describe the general nature of the action and the plaintiffs' rights in it (*see, e.g., Phillips Petroleum Co. v. Shutts, supra,* 472 U.S. 797, 811-812; *see, also, In re Cement and Concrete Antitrust Litigation* (9th Cir., 1987) 817 F.2d 1435, 1440-1441 (no due process violation where notice of settlement failed to advise absent class members that trial court had ordered offsets against their share).[14]

Until the present Petition for Writ of Certiorari, petitioners **never** challenged the class notice as inadequate under *Eisen*. Instead, petitioners' complaints about notice have always been designed to deprive respondents of their right to assert offsets. As petitioners' counsel stated at the hearing after remand: "We could have put a 15-

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[13] California Civil Code section 1950.5 does not provide for "notice" in the context of Constitutional due process. The statute simply requires an "itemized statement" of the disposition of the security (sec. 1950.5, subd. (e)) (Pet. App. 84). Moreover, in a class action, "actual notice" to absent class members is not required. The test is whether the trial court provided the "best notice practicable" to apprize interested parties of the pendency of the action. *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. 156.

[14] Overruled on other grounds in *California v. A.R.C.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989).

second spot in the Super Bowl, but you know, I don't know what to suggest from the [petitioners'] point of view. It's just too long and too far away to ever give notice . . . " (RTII 66). The claim is specious. *Jurisdiction, once gained, cannot be lost.*

The Evidentiary Hearing on Class-Wide Issues

The evidentiary hearing on class-wide issues was presented over four days. Petitioners' characterization of the hearing as an "adjudication" of offsets against non-appearing absent class members (Pet., p. 10) is false. It was stipulated that the scope of the hearing was limited to respondents' *prima facie* proof of offsets and petitioners' class-wide equitable defenses. Petitioners' counsel vigorously represented the class with respect to those issues.

Respondents established their *prima facie* offsets through the uncontroverted testimony of their operations manager and a real estate expert. The expert added indirect turnover costs, which had been omitted, to arrive at the actual damages for each individual tenancy (Exh. 287; RTII 287-292). He then adjusted the costs for ordinary wear and tear for each individual tenancy, considering the duration of each tenancy (RTII 286, 288-289). Based on this uncontroverted evidence, the trial court found that respondents "proved by a preponderance of the evidence that they suffered damages for unpaid rent, repairs and cleaning and that the amount thereof was reasonable" (JAII 6199-6200). The California Court of Appeal affirmed (Pet. App. 46-48).

The trial court also found that respondents' damages were proximately caused by the tenant class members.[15]

During the pertinent time period, respondents' business practice was to bring each unit to "as near as new" condition as possible when each tenant vacated. The class members' rental agreements required them to notify the resident manager if the unit was not in that condition.

Based on this evidence, the trial court specifically found, *inter alia*, in the aggregate, as a result of the 9,240 tenant turnovers during the period at issue, after adjustment for ordinary wear and tear, respondents suffered $1,411,000 in damages in excess of the total amount of the security (JAII 5914.3-5914.4). That $1.4 million in damages, plus all of the jury-found security, was spent for the benefit of the class for unpaid rent and for cleaning and repairs. The California Court of Appeal affirmed (Pet. App. 43).

The Individual Claims Process

It is well within the trial court's discretion to utilize a claims procedure in a class action to process claims and determine individual damages.[16] Federal courts often utilize the "sensible device" of split trials – liability issues

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[15] Under California law, where property is renovated prior to inception of tenancy and surrendered in damaged condition, the lessor has made a *prima facie* case that the tenant caused damage. *Markowitz v. Ikemoto*, 159 Cal.App.2d 242, 246 (1958).

[16] The claims procedure in this case was similar to that utilized in *Shump v. Balka*, 574 F.2d 1341, 1346 (10th Cir., 1978), a class action for the return of "maintenance fees" under a federal statute which provided that rent for public housing tenants

are determined on a class-wide basis and individual damages are resolved during a claims process (*see, e.g., Green v. Wolf Corporation*, 406 F.2d 291, 301 (1968); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447-448 (5th Cir., 1973)).

The individualized claims process in this case – which petitioners failed to discuss – was conducted in accordance with California Small Claims Court procedures, facilitated by a claims officer and a retired judge acting as referee. For those claimants against whom respondents claimed offsets, respondents provided an itemization of the damages for unpaid rent, cleaning and repairs. Copies of supporting documentation (i.e., invoices, bills, etc.) were provided to the claimant on request (Exhs. 296, 297). If the claimant objected to any of the costs, he or she could request an individual hearing before the referee. In those individual hearings, respondents were required to prove their individualized offsets by a preponderance of the evidence.

The procedures adopted by the trial court to resolve the offsets and equitable defenses were well within the trial court's discretion. The California Court of Appeal so held (Pet. App. 48-49).

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could not exceed 25% of their income. In *Shump*, pursuant to a settlement agreement, refunds were sent to the tenants, first reducing each tenant's settlement by his or her delinquent rentals and costs of repair. The tenants were then given 90 days to challenge the amount returned to them. In this case, the claimants were given an opportunity to contest respondents' offsets before any money was distributed.

Petitioners Conceded the Trial Court's Discretion to Order a Claims-Made Remedy, i.e., Reversion of the Unclaimed Residue to Respondents

Petitioners' claim of error with respect to the disposition of the unclaimed residue is flawed, not only by their concession of the trial court's discretion to order that remedy, but because the substantive law is to the contrary.

In *Granberry, supra,* 9 Cal.4th 738 (Pet. App. 1-38), the California Supreme Court considered petitioners' challenges to the trial court's *power* to order the reversion of unclaimed funds to respondents. Any federal constitutional challenge should have been raised at that time – petitioners did not do so. Instead, petitioners urged a construction of California Code of Civil Procedure section 384 and the California Unclaimed Property Law (Code of Civ. Proc. sec. 1500, et seq) which would bar reversion. The California Supreme Court rejected the argument, and directed the trial court to utilize section 384 as guidance to shape the remedy on remand. The California Supreme Court specifically held that the California Legislature had preserved the trial courts' equitable discretion (*Granberry, supra,* 9 Cal.4th at pp. 750-751 (Pet. App. 18-19)).

On remand, petitioners' counsel **conceded** that the trial court had discretion to again order a claims-made remedy (RT II, 757):

> "THE COURT: So you believe that the Court has discretion, but under the facts of this case it would be an abuse of discretion to allow the money to go back to the defendant. Is that your position?

> [Petitioners' Counsel]: I think that that's the fairest reading of the Supreme Court decision, that they have not come down and said you don't have the discretion. . . . " (RTII 757).

Therefore, the only question before the trial court was whether the claims-made remedy was fair *on the facts.*

The uncontroverted evidence was that, on a class-wide basis, from April, 1978 to September, 1984, respondents collected security in the total amount of $1,418,559 ($976,559 as "rent differential" and $442,000 as "security deposits"). Of the $442,000 which respondents had taken under the security deposit program, $348,000 had already been returned. Thus, the net revenue was $1,072,000 (JAII 5914.3). During the same period, respondents' total costs, adjusted for ordinary wear and tear, were $2,484,000. Therefore, while the rent discount program was in place, respondents suffered a net loss of $1.4 million (JAII 5914.3).

Respondents' net loss *represents money actually spent for the benefit of the absent class members* for unpaid rent, cleaning and damages – the trial court specifically found no unjust enrichment (JAII 5914.14). The trial court also specifically found that "disgorgement" or escheat would improperly penalize respondents for their good faith misinterpretation of an uncertain statute, particularly since there was nothing to "disgorge" or "escheat" (JAII 6122-6123, 6201, 6208). The California Court of Appeal affirmed (Pet. App. 49).

Under these circumstances, petitioners' claim that the claims-made remedy constituted a "taking" without due process is entirely without merit for numerous reasons:

First, there was no taking, because there was nothing to take – all of the security, plus $1.4 million, had been spent for the benefit of the class.

Second, as noted above, the security does not "belong" to the tenant in any event. Under California law, there is a debtor-creditor relationship between landlord and tenant with respect to the security. *Korens v. R. W. Zuken, supra,* 212 Cal.App.3d 1054.

Third, nothing occurred "without due process" because the requisite notices were given to the class.

Finally, the state court's order of reversion is consistent with federal law.[17] *See, e.g., Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989), where the court found that it was more appropriate to return a portion of the unclaimed residue of a Title VII fund to the defendant than to order *cy pres*.[18] The court based its ruling on the compensatory purpose of Title VII, noting that the disputed hiring policy "was not a product of invidious discrimination but represented a market decision that the

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[17] In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), cited by petitioners, this Court held that absent class members have an equitable interest in any fund created by the action for the purpose of responsibility for attorneys' fees. This Court recognized Boeing's right to the unclaimed funds if the absent class members failed to make a claim (*Ibid.*, 44 U.S. at p. 482).

[18] In this case, *cy pres* had already been achieved because more money had been spent on the tenancies (i.e., $1.4 million) than comprised the theoretical net residue ($750,000).

airlines believed in good faith to be legal, but found out to the contrary" (*Id.*, 880 F.2d 807, 815, emphasis added). *See, also, Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir., 1997), *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir., 1991), and *Societe Generale De Banque v. Touche Ross & Co.*, 729 F.2d 628 (9th Cir., 1983) (all involving reversion or payback of unclaimed settlement funds to defendants.)[19]

The Opinion of the Court of Appeal (Pet. App. 39-57) and the Supreme Court's Denial of Review

In light of the procedural history set forth above, it is not surprising that the California Court of Appeal affirmed the trial court's rulings. The appellate court found jurisdiction over the class under *Phillips Petroleum Co. v. Shutts, supra*, 472 U.S. 797, and also found, as a matter of fact, that petitioners "acknowledged that the trial court has jurisdiction" to resolve the affirmative defense of offset (Pet. App. 44). The Court also found no abuse of discretion with respect to the claims made remedy (Pet. App. 49).

The California Supreme Court properly denied review because it had already decided all of the rules of

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[19] In *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), cited by petitioners, the Ninth Circuit first acknowledged the trial court's "broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds," but found reversion not an available option because (a) the objective of the Farm Labor Contractor Registration Act is deterrence in all cases, (b) defendant made no effort whatsoever to comply with the law (*Id.*, 904 F.2d at pp. 1303-1304, 1307, 1309).

California law and statutory interpretation applicable to the case and because the California Court of Appeal had properly found that the trial court lawfully exercised the discretion conferred upon it to resolve the remaining issues in the case.

CONCLUSION

"The class action is a product of the court of equity – codified in section 382 of the Code of Civil Procedure. It rests on considerations of necessity and convenience, adopted to prevent a failure of justice." *Granberry, supra,* 9 Cal.4th 738, 750 (Pet. App. 18). There was no error here.

Petitioners selected a class action as the procedural vehicle by which to litigate their claims. They described the class as broadly as possible in order to maximize their potential recovery. They pleaded respondents' right to claim offsets, insisted that the trial court had jurisdiction to resolve all the issues, and argued that they could adequately represent the class with respect to all issues. Yet, once the California Supreme Court found that respondents were entitled to claim offsets, petitioners abandoned their prior position, and began to apply class action law only to their claim of "security" and not to respondents' defensive claim of offsets. The California Courts properly rejected that approach. There are no

grounds – and there is no cause – for this Court to review the matter.

Respectfully submitted,

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APPENDIX

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Attorneys for Plaintiffs

(All papers should be served
at the San Francisco Address)

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al. Plaintiffs, v. ISLAY INVESTMENTS, et al. Defendants.	NO. 136428 DECLARATION RE: MAILING OF NOTICE TO CLASS

I, Morris C. Klein, declare:

1. I am the Chief Executive Officer of Direct Mail Marketing Services, Inc., and my business address is 144

Townsend Street, San Francisco, California 94107. I am over the age of eighteen years and not a party to the within entitled action, and if called as a witness could and would testify competently thereto.

2. Direct Mail Marketing Services, Inc., was provided with approximately 8,000 to 9,000 forms of which Exhibit "A", attached hereto, is representative. Direct Mail Marketing Services, Inc., supervised the transcription of forwarding addresses from those forms. There were 5,438 forms that contained forwarding addresses.

3. For each forwarding address a copy of the Notice To Class, Exhibit "B", attached hereto, was addressed to the persons at the address on the service list, attached hereto as Exhibit "C".

4. On December 28, 1987, I caused the attached Notice To Class to be deposited in the United States mail at San Francisco, enclosed in a sealed envelope, with postage thereon fully pre-paid, addressed as shown on the attached service list.

I, Morris C. Klein, declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 1988, at San Francisco, California.

/s/ Morris C. Klein
MORRIS C. KLEIN

EXHIBIT A

ISLAY INFORMATION FORM

CONTRACT NUMBER _____

CONTRACT DATE __/__/__

TENNANT #1

First Name _____

Last Name _____

Forwarding Address _____
_____
_____

TENNANT #2

First Name _____

Last Name _____

Forwarding Address _____
_____
_____

TENNANT #3

First Name _____

Last Name _____

Forwarding Address _____
_____
_____

APARTMENT NAME _____

UNIT NO.___

IN __/__/__ NOTICE __/__/__

VACATED __/__/__ FIRST MONTHS RENT ___

SECOND MONTHS RENT ___

##########

DAMAGE Yes __ No __

EXCESSIVE CLEANING TIME Yes __ No __

FURNITURE

_____

DAMAGE

_____

COMMENTS

_____

CLEANER'S NAME _____

CL. TIME _____

_____

EXHIBIT B

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA BARBARA

LISA GRANBERRY, et al., Plaintiffs, v. ISLAY INVESTMENTS, et al., Defendants.	NO. 136428 NOTICE TO CLASS

TO ALL PRESENT AND PAST TENANTS OF RESIDENTIAL APARTMENTS MANAGED BY ISLAY INVESTMENTS:

If you currently reside in an apartment managed by Islay Investments or if you vacated an apartment managed by Islay Investments on or after September 27, 1978, and paid a higher amount of rent for the first month (or 31 days) of the tenancy than for the second and subsequent months, so long as you paid on a monthly basis;

YOU ARE HEREBY NOTIFIED that a class action lawsuit is pending on your behalf in the Santa Barbara Superior Court.

In the lawsuit, the Plaintiffs have alleged that the Defendant, Islay Investments, has charged its tenants a nonrefundable security deposit in the form of a surcharge on the first month's rent. Plaintiffs allege that each time Defendants charged a higher amount for the first months' rent than for the second and subsequent months. Defendants violated various provisions of California Civil Code Section 1950.5.

Defendants contend that the entire amount charged and collected for the first month (or 31 days) of any tenancy at a building managed by Islay Investments was solely for the tenant's use and occupancy of the premises and therefore, constituted rent, and was not any form of "security" or other refundable fee or charge. Defendants also contend that any refund you might be entitled to recover must be reduced by the amount of any unpaid rent, costs reasonably necessary to clean and repair damage you caused to the apartment, in excess of ordinary

wear and tear, and that such sum could exceed the amount of any refund or damages you might receive.

YOU ARE FURTHER NOTIFIED that this lawsuit seeks from Defendant Islay Investments an accounting of the nonrefundable alleged security deposits, interest on the alleged security held or disbursement of profits made on the alleged security held, and punitive damages not to exceed the sum of $200.00 per violation of Civil Code Section 1950.5(h). In addition Plaintiffs seek a court order declaring that defendants' rent surcharge is a nonrefundable security deposit which is prohibited by Civil Code Section 1950.5. Plaintiffs' attorneys estimate that reasonable attorneys fees and costs will total 25% or less of the total aggregate recovery, which fees and costs will be deducted from any recovery.

YOU ARE FURTHER NOTIFIED that you may be *excluded* as a participant in this class action lawsuit by submitting a written request on the attached form to:

Santa Barbara Superior Court
Clerk, Department 1
1100 Anacapa Street
Santa Barbara, California 93102

If you are a member of the above described class of persons and do not submit a written request to be excluded you will be represented by Plaintiffs' counsel and will be bound by any judgment in the action whether it be favorable or unfavorable. If you do not wish to be represented by Plaintiffs' counsel you may intervene in this action through counsel of your own choosing.

THIS NOTICE IS NOT TO BE UNDERSTOOD AS ANY EXPRESSION OF ANY OPINION BY THIS

COURT AS TO THE MERITS OF ANY OF THE CLAIMS OR DEFENSES ASSERTED BY EITHER SIDE IN THIS LITIGATION. THIS NOTICE IS SENT FOR THE SOLE PURPOSE OF INFORMING YOU OF THE PENDENCY OF THIS LITIGATION SO THAT YOU MAY DECIDE WHAT STEPS YOU DESIRE TO TAKE IN RELATION TO THIS LITIGATION.

Plaintiffs are represented by:

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Defendants are represented by:

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Betty L. Jeppesen
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Santa Barbara, California
93101

Anyone may examine the file in this action in the office of the Clerk for the Superior Court at 1100 Anacapa Street, Santa Barbara, California.

DO NOT CALL THE COURT!

Dated: August 10, 1987

RONALD C. STEVENS,
SUPERIOR COURT JUDGE

The undersigned requests to be excluded from the Plaintiff class that has been certified in this action.

Dated: _____, 1987.

_____
Signature

Please Print:

Your name: _____

Your address: _____ (Street)
_____ (City)
_____ (State)
_____ (Zip Code)

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States and a resident of the State of California. I am over the age of eighteen years and not a party to the within entitled action; my business address is 722 Montgomery Street, San Francisco, CA 94111.

On January 13, 1988, I served the within: DECLARATION RE: MAILING OF NOTICE TO CLASS (the actual service list being submitted only to the court, 191 pages of addresses), on the interested parties in said action, by depositing in the United States mail at San Francisco, true copies thereof enclosed in a sealed envelope:

MARCUS CRAHAN, JR., ESQ.
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ANTHONY R. ROMASANTA, ESQ.
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BETTY L. JEPPESEN
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Santa Barbara, CA 93101

WILLARD HASTINGS, ESQ.
Legal Defense Center
906 Garden St.
Santa Barbara, CA 93901

I, Debra M. Swann, declare under penalty of perjury that the foregoing is true and correct.

Executed on January 13, 1988, at San Francisco, California.

/s/ Debra M. Swann
DEBRA M. SWANN

California Code of Civil Procedure Section 431.70

Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party. The defense provided by this section is not available if the cross-demand is barred for failure to assert it in a prior action under Section 426.30. Neither person can be deprived of the benefits of this section by the assignment or death of the other. For the purposes of this section, a money judgment is a "demand for money" and, as applied to a money judgment, the demand is barred by the statute of limitations when enforcement of the judgment is barred under Chapter 3 (commencing with Section 683.010) of Division 1 of Title 9.